

³ The case record contains August 13, 2019 and January 16, 2020 decisions in which OWCP denied appellant's request that the acceptance of her claim be expanded to include additional cervical conditions causally related to her accepted February 24, 2015 employment injury. As more than 180 days has elapsed from the issuance of these decisions to the filing of this appeal, the Board lacks jurisdiction over the denial of appellant's expansion claim. See 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 22, 2018, as she no longer had disability or residuals causally related to her accepted February 24, 2015 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals after September 22, 2018 causally related to her accepted February 24, 2015 employment injury.

FACTUAL HISTORY

On March 2, 2015 appellant, then a 23-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 24, 2015 she sustained a back injury when she slipped and fell on ice while in the performance of duty. She stopped work on February 25, 2015. In March 2015 appellant first returned to work after her original work stoppage and, in May 2015, she stopped work again. OWCP paid her wage-loss compensation for disability from work on the supplemental rolls for the period May 18 through December 22, 2015.

On January 14, 2016 Dr. Marc Cohen, a Board-certified orthopedic surgeon, performed OWCP-authorized back surgery, including open laminectomy and lateral recess decompression at L5-S1, and posterolateral discectomy at L3-4 and L5-S1. In April 2016 appellant returned to light-duty work on a full-time basis.

OWCP accepted appellant's claim for intervertebral disc disorders of the lumbosacral region at L3-4 and L5-S1 with radiculopathies, and other specified dorsopathies of the cervical region.

In a November 5, 2017 report, Dr. Michael Binder, a Board-certified anesthesiologist, noted that appellant primarily complained of neck and lower back pain. He indicated that, upon physical examination, appellant exhibited diminished range of motion of the cervical and lumbar spine. Dr. Binder diagnosed left cervical post-traumatic sprain/strain; left cervical radiculopathy at C6 *versus* bilateral cervical post-traumatic facet syndrome at the C4-5, C5-6, and C6-7; lumbar post-traumatic sprain/strain; and left lumbar radiculopathy at L3-4 *versus* bilateral lumbar post-traumatic facet syndrome at the L3-4, L4-5, and L5-S1. He opined that these conditions were related to the February 24, 2015 employment injury.

In March and July 2018 OWCP referred appellant for second opinion examinations and evaluations with Dr. Melvin Vigman, a Board-certified neurologist, and Dr. Andrew Farber, a Board-certified orthopedic surgeon. It provided each physician with a statement of accepted facts (SOAF) and a series of questions and requested that they provide an opinion regarding whether appellant continued to have disability or residuals causally related to her accepted February 24, 2015 employment injury.

In an April 5, 2018 report, Dr. Vigman discussed appellant's factual and medical history, noting that the SOAF indicated that the accepted conditions were "intervertebral discs disorders with radiculopathy, lumbar region L3-4 and L4-5 and cervical region and dorsopathy." He further noted, "I presume that means dorsal spine." Dr. Vigman advised that appellant currently complained of back pain and shooting pain into the left lateral thigh. He reported the findings of the physical examination he performed on April 4, 2018, noting that appellant's upper extremity examination showed normal strength in all muscle groups proximally and distally, normal

cutaneous sensation at dermatomes C5 through C8, and 1+ reflexes. On lower extremity examination, appellant had normal strength in all muscle groups proximally and had normal cutaneous sensation dermatomes L3 through S1 bilaterally. Dr. Vigman noted that, on flexing her lower back to 90 degrees, appellant complained of left paraspinal discomfort. He provided a diagnosis of no neurological disease, damage, or dysfunction.

After his review of the medical records, Dr. Vigman opined that there did not appear to have been a true indication for the January 14, 2016 lumbar surgery. He indicated that the magnetic resonance imaging (MRI) scans of record obtained on the date of injury demonstrated a normal lumbar MRI scan and did not indicate that there were herniated lumbar discs and did not confirm central spinal stenosis. Dr. Vigman maintained that these diagnoses were used to justify the surgery, but that the surgery was not done for neurological purposes. He indicated that the “objective aspects of the case are totally normal neurologically” and did not support the subjective symptomatology. Dr. Vigman indicated that the lumbar spine MRI scans of record “did not support neurological problems in this case.” He noted “the current diagnoses” from a neurological standpoint did not exist and there was no neurological diagnosis, neurological damage, or dysfunction. Dr. Vigman indicated, “[i]n my opinion, the question of the work-related conditions having resolved: the work-related conditions never caused a neurological problem. Appellant has reached maximum medical improvement [MMI] neurologically with no permanency.” Dr. Vigman noted that, from a neurological standpoint, appellant was capable of full-time work without any restrictions. In an April 4, 2018 work capacity evaluation (Form OWCP-5c), he indicated that appellant was able to perform her regular job without restrictions.

In a July 2, 2018 report, Dr. Farber discussed appellant’s factual and medical evidence, noting that she continued to complain of radicular symptoms in her left upper and left lower extremities. He noted that, upon physical examination of the cervical spine, appellant was nontender about the cervical spine and had a negative Spurling’s test. Upon examination of the lumbar spine, there was no erythema or evidence of infection around the incision area from the January 14, 2016 lumbar surgery and straight leg raising was negative bilaterally. Dr. Farber did not find neurovascular deficits of the extremities. He indicated that appellant was not presently suffering from disabling residuals of the accepted conditions and did not have a “current disability based on the examination of today.” Dr. Farber concluded that appellant did not require further medical treatment as she had reached MMI and was capable of returning to her date-of-injury work without restrictions. In a July 2, 2018 Form OWCP-5c, he indicated that appellant was able to perform her regular job without restrictions.

OWCP then requested that Dr. Farber clarify his July 2, 2018 report by providing a more detailed discussion regarding appellant’s work-related residuals and disability. In a July 25, 2018 supplemental report, Dr. Farber indicated that appellant was not presently suffering from disabling residuals of the accepted conditions based upon the July 2, 2018 physical examination. He noted that, upon examination of the cervical spine, she was nontender about the cervical spine, range of cervical motion was normal in all planes, and Spurling’s test was negative. Examination of the lumbar spine revealed no erythema or evidence of infection and normal range of motion during extension and side bending. Dr. Farber advised that flexion was decreased, a finding he believed was normal given that appellant was status post lumbar laminectomy. Appellant had negative straight leg raise bilaterally and there was no evidence of radiculopathy on examination. Dr. Farber indicated that appellant had reached MMI and there was no need for further treatment. He opined that appellant was not disabled and was capable of returning to her date-of-injury job without restrictions.

In a notice dated July 26, 2018, OWCP advised appellant that it proposed to terminate her entitlement to wage-loss compensation and medical benefits as she no longer had residuals or disability causally related to her accepted February 24, 2015 employment injury. It informed her that the weight of the medical opinion evidence regarding work-related residuals/disability rested with the opinions of Dr. Vigman and Dr. Farber, OWCP's referral physicians. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed termination action.

Appellant submitted an August 20, 2018 report in which Dr. Cohen indicated that, after the January 14, 2016 surgery, she did have improvement with reduction in some of her leg pain, but still had residual issues with respect to numbness and intermittent pain in the left leg. Dr. Cohen further explained, "[u]nfortunately the patient was left with persistent back and left leg radiculopathy.... She had pain going from the buttocks to the thigh to the calf to the foot with associated tingling and numbness." Dr. Cohen noted that appellant was left with a two-level lumbar disc surgery that caused "functional and work-related permanency" with respect to her ability to forward and laterally bend, to lift, and to sit or stand in one position for any extreme period. Regarding appellant's post-surgery condition, he opined that appellant's injuries were permanent in nature and that appellant was unable to return back to her job without restrictions. Dr. Cohen noted that he was completely in disagreement with the opinions of Dr. Vigman and Dr. Farber, which had been provided to him.

By decision dated September 21, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective September 22, 2018, as she no longer had disability or residuals causally related to her accepted February 24, 2015 employment injury.

On October 2, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During a hearing held on January 29, 2019, counsel argued that the opinions of Dr. Vigman and Dr. Farber were not well rationalized, or in the alternative, there was a conflict in the medical opinion evidence between their reports and those of appellant's attending physicians, Dr. Binder and Dr. Cohen.

OWCP received a January 3, 2019 report from Dr. Joseph W. Dryer, a Board-certified orthopedic surgeon, who indicated that appellant did not sustain any permanent lumbar injuries due to the February 24, 2015 accident.

By decision dated April 4, 2019, OWCP's hearing representative affirmed the September 21, 2018 termination decision.⁴

By decision dated March 6, 2020, OWCP denied modification of its April 4, 2019 termination decision.

⁴ OWCP's hearing representative also found that there was a conflict in the medical opinion evidence regarding appellant's expansion claim and remanded the case to OWCP for further development, including referral of appellant for an impartial medical examination. Based on the July 18, 2019 report of Dr. Lydia Shajenko, a Board-certified neurologist serving as an impartial medical examiner (IME), OWCP issued August 13, 2019 and January 16, 2020 decisions denying appellant's request that the acceptance of her claim be expanded to include additional cervical conditions causally related to her accepted February 24, 2015 employment injury. As noted above, the Board lacks jurisdiction over the denial of appellant's expansion claim. *See supra* note 3.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁵ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 22, 2018.

In his April 5, 2018 report, Dr. Vigman determined that appellant did not have any residuals of her accepted employment injuries and could return to her date-of-injury job without restrictions. However, he did not provide any notable discussion of the conditions accepted in connection with the February 24, 2015 employment injury, *i.e.*, intervertebral disc disorders of the lumbosacral region at L3-4 and L5-S1 with radiculopathies, and other specified dorsopathies of the cervical region. Dr. Vigman did not provide any discussion of when and how the accepted employment injuries had resolved.

Moreover, in portions of his report, Dr. Vigman suggested that appellant did not actually sustain all of the accepted employment conditions. He noted, "[i]n my opinion, the question of the work-related conditions having resolved: the work-related conditions never caused a neurological problem." Dr. Vigman indicated that the magnetic resonance imaging (MRI) scans of record obtained on the date of injury demonstrated a normal lumbar MRI scan and did not indicate that there were herniated lumbar discs and therefore did not confirm central spinal stenosis. However, OWCP had accepted that appellant sustained a lumbar condition that could be characterized as having caused a neurological problem, *i.e.*, the accepted lumbar radiculopathy stemming from the L3-4 and L5-S1 discs. In addition, Dr. Vigman provided an opinion that the January 14, 2016 lumbar surgery, which was authorized by OWCP was not necessitated by an accepted employment injury. The Board has held that the findings of an OWCP referral physician or IME must be based on the factual underpinnings of the claim, as set forth in the SOAF.⁸ OWCP's procedures provide that when an OWCP referral physician, IME, or district medical adviser (DMA) renders a medical opinion based on an SOAF, which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of

⁵ *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁷ *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *See A.D.*, Docket No. 20-0553 (issued April 19, 2021).

the opinion is seriously diminished or negated altogether.⁹ Given his failure to acknowledge all the accepted employment conditions, Dr. Vigman's opinion is of diminished probative value.

The Board further finds that Dr. Farber's opinion also is not sufficiently well-rationalized to justify the termination of appellant's entitlement to wage-loss compensation and medical benefits, effective September 22, 2018. Dr. Farber indicated, in reports dated July 2 and 25, 2018, that appellant did not have any residuals of her accepted employment injuries and could return to her date-of-injury job without restrictions. However, his opinion in this regard consisted of brief conclusory statements without adequate explanation. Dr. Farber also did not provide any notable discussion of the conditions accepted in connection with the February 24, 2015 employment injury or explain when and how these conditions had resolved. In fact, in a portion of his July 25, 2018 report, he suggested that appellant still had residuals of the OWCP-authorized January 14, 2016 lumbar surgery. Dr. Farber advised that appellant's lumbar flexion was decreased, a finding he believed was related to that lumbar surgery. After Dr. Farber produced his July 2, 2018 report, OWCP requested that he provide a supplemental report, which included a more detailed discussion regarding appellant's work-related residuals and disability. However, the July 25, 2018 supplemental report did not provide significant additional discussion in this regard and essentially summarized examination findings contained in his July 2, 2018 report.

For these reasons, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 22, 2018.¹⁰

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 22, 2018.

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3a(10) (October 1990).

¹⁰ In light of the Board's finding regarding Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 30, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board